

Malayan Banking Bhd v Sepakat Computer Consultant Sdn Bhd & Ors (Intercontinental Nominees Sdn Bhd & Anor, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22-18 OF 2009
LEE SWEE SENG JC
6 SEPTEMBER 2011

Civil Procedure — Third parties — Third party notice — Application to set aside third party notice and leave order for its issue — Affidavits filed by defendant and third parties raised various contentious issues — Whether defendant had plausible claim and reasonable cause of action against them

The second and third defendants were directors and shareholders of the first defendant ('the company'). Both of them were also guarantors for a loan the company had taken from the plaintiff. Pursuant to an agreement, partly written and partly oral, Rosedy disposed of the entire 3,250,000 shares he owned in the company to the first third party ('Intercontinental') which eventually became the majority shareholder in the company. The second third party ('Rashid') was a director of Intercontinental and had a controlling interest in that company. Among the agreed terms for the sale of the shares was that Rashid would substitute Rosedy as guarantor to all financial institutions from whom the company had obtained loans or facilities. The company wrote to the plaintiff requesting Rosedy's release as guarantor for the loan and giving Rashid's particulars for him to be substituted as the new guarantor. For some reason, Rosedy's release as guarantor was not followed through and when the company defaulted on its loan the plaintiff sued him as guarantor in its action for recovery. Rosedy obtained leave from the registrar to issue a third-party notice against Intercontinental and Rashid claiming for, inter alia, a declaration that he was entitled to be indemnified by them for any claim or judgment taken against him by any financial institution based upon the guarantees he had executed for the company's benefit. Upon being served with the third-party notice, the third parties applied under O 16 rr 4 and 6 of the Rules of the High Court 1980 to set aside both the third-party notice and the leave order for its issue. On the registrar's dismissal of the application, the third parties appealed to the judge.

Held, dismissing the appeal with costs:

- (1) Rosedy had a plausible claim and a reasonable cause of action against the third parties. At this stage it was not necessary to descend into a contest or trial on affidavits (see para 36).

- A (2) At the leave stage and in hearing the application to set aside the leave and
the third party notice, the court's only concern was whether Rosedy had
a cause of action against the third parties. At this stage, the court would
not go into the merits of Rosedy's case against them. So long as he had a
prima facie claim against the third parties which was not frivolous or
B unmeritorious, that sufficed (see para 20).
- (3) The reasonable expectations of businessmen ought to be given due
consideration where not all the terms of a contract was expressed in
writing. Rosedy had a reasonable expectation as a sensible businessman,
C and indeed he said it was made known to him by Rashid's representative
and agent, that Rashid would replace him as guarantor. If it was Rashid's
contention that Rosedy was to continue as guarantor of the company's
loan in spite of his disposal of all interest in the company, then Rashid
must testify at the trial to that effect as there was no evidence pointing in
D that direction (see paras 27, 30 & 32).

[Bahasa Malaysia summary]

- Defendan kedua dan ketiga adalah pengarah-pengarah dan
pemegang-pemegang saham defendan pertama ('syarikat'). Kedua-dua mereka
E juga adalah penjamin-penjamin untuk pinjaman yang diambil oleh syarikat
daripada plaintif. Berikutan suatu perjanjian, sebahagiannya bertulis dan
sebahagiannya secara lisan, Rosedy menjual kesemua sebanyak 3,250,000
saham-saham yang dimilikinya di dalam syarikat kepada pihak ketiga pertama
(‘Intercontinental’) yang akhirnya menjadi pemegang saham majoriti di dalam
F syarikat. Pihak ketiga kedua (‘Rashid’) adalah pengarah Intercontinental dan
mempunyai kepetingan pengawalan di dalam syarikat tersebut. Di antara
terma-terma yang dipersetujui untuk jualan saham-saham adalah bahawa
Rashid akan menggantikan Rosedy sebagai penjamin kepada kesemua institusi
G kewangan di mana syarikat tersebut memperolehi pinjaman-pinjaman atau
kemudahan-kemudahan. Syarikat menulis kepada plaintif memohon
pelepasan Rosedy sebagai penjamin untuk pinjaman dan memberikan
butir-butir mengenai Rashid untuk dia digantikan sebagai penjamin baru. Atas
sesuatu alasan, pelepasan Rosedy sebagai penjamin tidak berjalan lancar dan
H apabila syarikat mengingkari daripada membayar pinjamannya plaintif
menyaman dia sebagai penjamin dalam tindakannya untuk mendapatkan
semula. Rosedy memperolehi kebenaran daripada pendaftar untuk
mengeluarkan notis pihak ketiga terhadap Intercontinental dan Rashid
menuntut untuknya, antara lain, perisytiharan bahawa dia berhak untuk
I diambil terhadapnya oleh mana-mana institusi kewangan berdasarkan atas
jaminan-jaminan yang dia laksanakan untuk manfaat syarikat. Selepas
diserahkan dengan notis pihak ketiga, pihak-pihak ketiga memohon di bawah
A 16 kk 4 dan 6 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk
mengenepikan kedua-dua notis pihak ketiga dan perintah kebenaran untuk

pengeluarannya. Atas penolakan pendaftar terhadap permohonan tersebut, pihak-pihak ketiga merayu kepada hakim. **A**

Diputuskan, menolak rayuan dengan kos:

- (1) Rosedy mempunyai tuntutan munasabah dan kausa munasabah tindakan terhadap pihak ketiga. Pada peringkat ini tidak perlu untuk 'descend' kepada pertikaian atau perbicaraan atas affidavit-afidavit (lihat perenggan 36). **B**
- (2) Pada peringkat kebenaran dan dalam mendengar permohonan untuk mengeneipkan kebenaran dan notis pihak ketiga, satu-satunya yang menjadi perhatian mahkamah adalah sama ada Rosedy mempunyai kausa tindakan terhadap pihak-pihak ketiga. Pada peringkat ini, mahkamah tidak akan mendengar merit kes Rosedy terhadap mereka. Asalkan dia mempunyai tuntutan *prima facie* terhadap pihak-pihak ketiga yang tidak remeh-temeh atau tidak bermerit, itu sudah mencukupi (lihat perenggan 20). **C**
- (3) Jangkaan-jangkaan munasabah peniaga patut diberikan pertimbangan di mana tidak kesemua terma-terma kontrak ditulis. Rosedy mempunyai jangkaan munasabah sebagai peniaga yang bijak, dan dia menyatakan memang idia diberitahu oleh wakil dan ejen Rashid, bahawa Rashid akan menggantikan dia sebagai penjamin. Jika ia adalah hujahan Rashid bahawa Rosedy akan meneruskan sebagai penjamin pinjaman syarikat walaupun penolakannya terhadap kesemua kepentingan di dalam syarikat, oleh itu Rashid mestilah memberi keterangan semasa perbicaraan yang menjaminkan bahawa tidak terdapat keterangan yang mengarahkan kepada arahan tersebut (lihat perenggan 27, 30 & 32).] **D**

Notes

For cases on third party notice, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8610–8612. **E**

Cases referred to

- Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417, CA (refd) **H**
- BBC Estate V Sdn Bhd & Ors v TR Madel anak Kandou & Ors* [2008] 6 MLJ 285, CA (folld)
- Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (refd)
- Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177, PC (refd) **I**
- Fusing Construction Sdn Bhd v EON Finance Bhd & Ors* [2000] 3 MLJ 95, CA (refd)
- Hee Awa & Ors v Syed Muhammad Sazaly & Anor* [1988] 1 MLJ 300; [1987] 1 LNS 109, SC (refd)

- A** *Hong Leong Nominees Sdn Bhd & Anor v Tommy Lim Boon Cheow & Anor (Lachaman Lalchand & Associates, third party)* [2000] 5 MLJ 96, HC (refd)
Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping Perak & Ors [1989] 1 MLJ 226; [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98, SC (refd)
Pacific Asia Leasing (M) Sdn Bhd v Senanti Motors Sdn Bhd & Anor (YM Tunku
- B** *Kamil Ikram, third party)* [1992] 2 MLJ 364, HC (refd)
RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) [2010] 1 WLR 753, SC (refd)
Slade and Kempton (Jewellery) Ltd v Kayman Ltd [1969] 1 WLR 1285; [1969] 3 All ER 786, CA (refd)
- C** *Zulkifle Sabarudin v Fauziah Arshad; Arifah Arshad (Third Party)* [2005] 1 LNS 393, HC (refd)

Legislation referred to

Rules of the High Court 1980 O16, O 16 rr 4, 6, O 18 r 19

- D** *Haslina Hassan (Ariff & Co) for the plaintiff.*
T Jayadeva (Radhakrishnan) for the defendant.
V Vishnu Kumar (Saifudin bin Shahrudin with him) (Alvin John & Partners) for the third parties.

- E** **Lee Swee Seng JC:**

PROLOGUE

- F** [1] This case tells the not too unfamiliar story of a shareholder who had disposed of all his shares in a company and still left unattended to completion the release of himself as a guarantor to all the loans taken by the company, which loans he had guaranteed repayment.

- G** [2] As is often the case, when the lender bank sues, the shareholder who is also a guarantor would have no remedy but to join in the new shareholders or their representative/director as a third party, seeking an indemnity from the said third party.

- H** PARTIES

- I** [3] The third defendant was a shareholder of 3,250,000 shares in the first defendant company and director of the first defendant company. The first defendant had taken a loan from the plaintiff and the third defendant is a guarantor of the loan together with the second defendant who is also a shareholder of 1,750,000 shares in the first defendant company and a director in the first defendant company.

- [4] The third defendant through an agreement partly in writing and partly

oral, had agreed to dispose of his entire shareholding of 3,250,000 shares in the first defendant to the first third party Intercontinental Nominees Sdn Bhd (formerly known as Rashid & Lee Nominees Sdn Bhd). The first third party is the duly registered shareholder of the shares of the third defendant. Indeed in exh RI9 in the affidavit of the the third defendant there is evidence of filing of return of allotment of shares showing the first third party to be registered owner of the 5,100,000 shares in the first defendant as at 14 September 2004. The first defendant had by a letter to the plaintiff signed by its executive director one Encik Abdul Hamid Manaff ('the second defendant') and another Director Encik Mohamed Ali Ghazali given the particulars of the second third party Tan Sri Abdul Rashid bin Abdul Manaf as a replacement guarantor.

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[5] The second defendant is a brother of the second third party and Encik Mohamed Ali Ghazali was a corporate representative of the first third party an AG is agent for the negotiations leading to the disposal of the third defendant's shares though this is being disputed by the second third party.

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[6] The second third party is a director of the first third party, a corporate shareholder of the first defendant at the material time.

PROBLEM

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[7] The third defendant contended that the terms of the agreement partly in writing and partly oral with respect to his disposal of the shares belonging to him as vendor to the first third party as purchaser were, inter alia, as follows:

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- (a) the third defendant shall sell or dispose of his 3,250,000 shares ('the shares') in the first defendant to the first third party for the sale price of RM827,253;
- (b) the agreed sale price shall be set off against the third defendant's debt with the first defendant and that the first defendant shall collect the sale price directly from the first third party; and
- (c) the second third party shall substitute the third defendant as the guarantor from all financial institutions where the first defendant obtained loans or facilities.

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[8] The part of the agreement in writing was contained in a letter dated 20 May 2005 from the first defendant to the third defendant in which the above terms in (a) and (b) were set out.

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[9] The third defendant was not re-elected as a director of the first defendant at the first defendant company's annual general meeting on 22 December 2004. Encik Mohamed Ali Ghazali the corporate representative of Rashid &

A Lee Nominees Sdn Bhd said he was instructed via the proxy form to vote against the re-election of the third defendant as a director. The said proxy form is exhibited as exh MAG1 in the affidavit of Encik Mohamed Ali Ghazali in encl 52. The instruction had come from the second third party.

B [10] The first defendant company subsequently wrote to the plaintiff by their letter dated 12 July 2005 to propose the name of the second third party as the substitute guarantor which letter was signed by its Executive Director Encik Abdul Hamid Manaff and another director Encik Mohamed Ali Ghazali. The letter was captioned 'ROSEDY BIN ISSA — RELEASE AS A PERSONAL GUARANTOR':

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12th July 2005

Malayan Banking Berhad

D Corporate Remedial Management

Menara Maybank 100

Jalan Tun Perak 50050

E KUALA LUMPUR

ASSALAMUALAIKUM.

Attention: Encik Mohd Hanif Suadi - VP, Head, Corporate 1 Encik Ahmad Lutfi Abdul Rahman - AVP, Corporate 1

F Dear Sir,

ROSEDY BIN ISSA - RELEASE AS A PERSONAL GUARANTOR

We refer to your letter dated 9th July 2005 on the above.

G As requested, below are the particulars of the proposed replacement guarantor for your consideration. Attached are some documents to support this proposal.

Name:	Tan Sri Abdul Rashid bin Abdul Manaf
Relationship with the Company:	A director of Rashid & Lee Nominees Bhd, a Corporate shareholder of the company

H Thank you.

Yours faithfully,

sgd

I ...
ABDUL HAMID MANAFF
Executive Director

sgd

... A

MOHAMED ALI GHAZALI

Executive Director

[11] For some reasons the release of guarantor was not followed through. Therefore when the first defendant defaulted on its loan with the plaintiff, the plaintiff sued the first defendant and the guarantors as they appear in the plaintiff's record that is the second defendant and the third defendant.

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PRAYER C

[12] The third defendant applied for leave to issue a third party notice against the third parties claiming for:

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- (a) a declaration that the third defendant is entitled to be indemnified by the third parties against claims by all financial institutions under all guarantees executed by the third defendant for the benefit of the first defendant, including the plaintiff's claim;
- (b) judgment for any amount that may be found due from the third defendant to the plaintiff be paid to the plaintiff directly by the third parties;
- (c) judgment for the amount of any costs that the third defendant may be adjudged to pay the plaintiff and for the amount of his own costs in defending this action and the third party proceedings;
- (d) further or in the alternative, damages for breach of contract; and
- (e) such further or other relief as the honourable court may deem fit to grant.

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[13] The senior assistant registrar ('SAR') had granted leave for the third party notice to be issued to the third parties and the third parties upon being served with the third party notice applied, inter alia, for the following under O 16 rr 4 and 6 of the Rules of the High Court 1980 ('RHC'):

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- (a) that the order of court dated 7 October 2010 granting leave to issue a third party notice to the third parties be set aside;
- (b) that the third party notice dated 13 October 2010 be set aside;
- (c) that all proceedings against the third parties be terminated; and
- (d) that all costs be borne by the third defendant.

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[14] The SAR dismissed the said application of the third parties and against

- A that decision the third parties have appealed to this court in encl 65.

PRINCIPLES

- B [15] At the outset it is opportune to refresh our memory on the basis and rationale of a third party proceeding. In the words of His Lordship Malik Ishak J (as he then was) in *Zulkifle Sabarudin v Fauziah Arshad; Arifah Arshad (Third Party)* [2005] 1 LNS 393:
- C To add a third party, that third party must be one 'who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter' (per Lord Diplock in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52; [1968] 1 LNS 96; at p 55). In the words of Pennycuik J in
- D *Standard Securities, Ltd v Hubbard And Another* [1967] 2 All ER 622, 623:
- The objects of the rule are ... to prevent multiplicity of actions and to enable the court to settle disputes between all parties to them in one action and to prevent the same question from being tried twice with possibly different results.
- E
- F [16] It is entirely at the court's discretion whether to add a party as a co-defendant (*Hee Awa & Ors v Syed Muhammad Sazaly & Anor* [1988] 1 MLJ 300; [1987] 1 LNS 109 (SC)). Order 16 of the Rules of the High Court 1980 ('RHC') should be referred to when one talks about a third party notice. Third party proceedings are independent proceedings between the defendant as the plaintiff and the third parties as the defendants (*Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226; [1989] 1 CLJ 98 (Rep); [1989] 1 CLJ 137 (SC)). That being the case, third party proceedings may be dismissed for want of prosecution notwithstanding the existence of the action between the plaintiff and the defendant (*Slade and Kempton (Jewellery) Ltd v Kayman Ltd* [1969] 1 WLR 1285; [1969] 3 All ER 786).
- H [17] Before issuing a third party notice, the defendant must enter an appearance. And thereafter the defendant may issue a third party notice without the leave of the court provided the action proceeded by way of a writ and the defendant issues that third party notice before serving the defence onto the plaintiff. And leave of the court is necessary for the issuance of the third
- I party notice especially when the action is one begun by an originating summons or if the defendant has filed his defence and has served his defence onto the plaintiff.

- [18] When there is a claim for contribution or indemnity, a third party

proceedings is always ideal. Thus, once the third party has been served, he becomes a party to the action and it is just like as though he has been sued by the defendant ...'.

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[19] The fact that a third party proceeding is independent of and separate from the proceeding by a plaintiff against a defendant was emphasised in the Supreme Court case of *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping & Ors* [1989] 1 MLJ 226; [1989] 1 CLJ (Rep) 98 where His Lordship Hashim Yeop Sani Acting CJ (Malaya) said at p 228 (MLJ); p 101 (CLJ):

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We also do not think that a proceeding under O 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant. Third party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party.

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[20] At the leave stage and in hearing an application by the third party on setting aside the leave granted and the third party notice issued, the court is only concerned if there is a cause of action available to the third defendant against the third party. At this stage the court would not be going into the merits of the three defendant's case against the third party. That will be for the third defendant to prove at the trial for it is the third defendant suing the third party and directions shall no doubt be given at the appropriate stage as to the order of giving evidence and the conduct of the trial and in particular the third defendant's action against the third party. So long as the third defendant has a prima facie claim against the third party that is not frivolous or completely unmeritorious, that would suffice. See also *Hong Leong Nominees Sdn Bhd & Anor v Tommy Lim Boon Cheow & Anor (Lachaman Lalchand & Associates, third party)* [2000] 5 MLJ 96.

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[21] It is also helpful to put in proper perspective the purpose of a third party proceeding as penned by His Lordship Shankar J (as he then was) in *Pacific Asia Leasing (M) Sdn Bhd v Senanti Motors Sdn Bhd & Anor (YM Tunku Kamil Ikram, third party)* [1992] 2 MLJ 364 at p 368:

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The terms of O 16 r 1(1)(a) of the RHC in so many words apply to a defendant who 'claims ... any contribution'. I do not read these words as importing a precondition that the defendant must establish that his cause of action for a contribution should already have accrued at the time he takes out his third party notice. The second defendant here was claiming a contribution in the event that the court found him liable to make any payment to the plaintiff. The potential cause of action he had against the third party would have crystallised at that point and the mutual obligations of the parties should be resolved immediately at that stage.

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A [22] The third defendant is seeking a contribution and/or indemnity from the third party. The first third party is the one that had agreed to purchase the third defendant's shares in the first defendant for an agreed consideration of RM827,253. The transfer of the shares was fully effected with the new shares being issued in the name of the first third party. Why would the third defendant want to continue to be a guarantor for the loan of the first defendant when he is no longer a shareholder in the first defendant and not its director as well? In other words here is a case where the third defendant has no more interest in the first defendant company and has no say in the control and management of the company and yet has to be liable for the loan taken out by the first defendant when the third defendant was a shareholder and director! Why would the third defendant agree to such a deal? More so when being out of the company and having no relation with and no voice in the company and the benefits of the loan still being enjoyed by the new shareholder, the first third party, why should the third defendant be liable for that which he is not longer benefitting and over which he has no say or control. He is out of the company already!

E [23] There is some evidence that the third defendant was supposed to have been released as a guarantor. This can be seen in exh RI6 in the affidavit of the third defendant in support of his application for leave to issue the third party notice ('encl 24'). The letter of 12 July 2005 has been reproduced in full above. It is signed off by none other than the second defendant Encik Abdul Hamid Manaff, a brother of the second third party and Encik Mohamed Ali Ghazali as executive directors of the first defendant. At the trial, the third defendant will of course have to call Encik Mohamed Ali Ghazali to corroborate his evidence as to whether it was a term of the sale of shares transaction that the third defendant will be replaced as a guarantor by the second third party. The second third party is not unrelated to the first third party. Indeed he is a director of the first third party and has a controlling interest in the first third party. Unless it is a case of the plaintiff being willing to accept the 1st third party as a corporate guarantor, generally the plaintiff would require a substitute guarantor if a current guarantor were to be released. Indeed the letter in exh RI6 being a letter from the first defendant to the plaintiff dated 12 July 2005 made reference to: 'As requested, below are the particulars of the proposed replacement guarantor for your consideration.' The second third party was the person proposed as a replacement guarantor. In fact the plaintiff's letter of 9 July 2005 was also exhibited where the plaintiff had asked for the details of the replacement guarantor to replace the third defendant who was the current guarantor then. As to whether or why this was not followed through would be best dealt with at the trial where the relevant officers of the plaintiff to whom the said letter was attentioned that is Encik Mohd Hanif Suadi as Vice President and Head of Corporate 1 and Encik Ahmad Lutfi Abdul Rahman as Assistant Vice President Corporate 1 can testify.

[24] Encik Mohamed Ali Ghazali in his affidavit in encl 49 had averred that being the person entrusted by the second third party to negotiate the purchase of the shares from the third defendant to the first third party, it was a term of the transaction that the third defendant was to be substituted by the second third party as a guarantor (para 4(c) of the said affidavit). The evidence of the second defendant via his affidavit affirmed on 11 February 2011 is that the said Encik Mohamed Ali Ghazali was the person who negotiated the shares transfer transaction and that he was a representative of the first third party. Whether and to what extent this is the case will in the light of exh RI6 and what Encik Mohamed Ali Ghazali had averred be subject to cross-examination at trial. As the second third party's brother Encik Abdul Hamid Manaff had also signed the letter in exh RI6 to the plaintiff captioned 'Rosedy Bin Issa — Release as a Personal Guarantor', he too can give evidence either on behalf of the three defendant or the two third party as to the context and circumstances leading to the communication of the second third party's name as the replacement guarantor.

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[25] The second third party said that he had never met the third defendant and certainly had not agreed to be the substitute guarantor. However, there is no necessity to have met a current guarantor before one agrees to be a substitute guarantor. Encik Mohamed Ali Ghazali had stated that at all material times he acted as an agent of the second third party to negotiate the transaction. The fact remains that the shares of the third defendant were transferred to the first third party where the second third party has control. See *Fusing Construction Sdn Bhd v EON Finance Bhd & Ors* [2000] 3 MLJ 95.

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[26] There is further evidence that the second third party had authorised Encik Mohamed Ali Ghazali as the corporate representative of the first third party which is the majority shareholder in the first defendant to vote against the re-election of the third defendant as a director of the first defendant as can be seen in the proxy form in exh MAG1 in the affidavit of the said Encik Mohamed Ali Ghazali at the first defendant's AGM on 22 December 2002. All these are consistent with the fact that the third defendant having disposed of all his interest in the first defendant company, he is no longer to have any control and management powers in the first defendant company.

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[27] However if it is the second third party's contention that the third defendant was to continue as a guarantor of the loan taken by the first defendant inspite of the disposal of all his interest in the first defendant, then the second third party must of necessity testify at the trial to this effect as there is no evidence so far pointing in this direction.

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[28] At any rate if the second third party's contention is that some other new directors were supposed to replace the third defendant and not him then that is

A something that can only be established at trial. This is so inspite of my allowing the third parties to adduce further evidence on appeal wherein I had allowed them to refer to a letter from the plaintiff to the first defendant dated 9 March 2005 (encl 73 being the affidavit of the second third party in exh TSR1 which relevant parts at p 2 of 16 of the letter read:

B Proposed Restructuring of Banking Facilities
Item (ii) Additional security
Joint and Several Guarantee by:

- C** (1) Dato' Anuarudin bin Mohd Noor
(2) Mohamed Ali bin Ghazali
(3) Chandra Sekaran a/l P Perumal
D (4) Abdul Hamid bin Abdul Manaff.

E [29] As to why this was not followed through such that the third defendant should be released as a guarantor and as to why in a subsequent letter dated 12 July 2005 from the first defendant to the plaintiff ('exh RI6') only the second third party's name had been proposed as the replacement guarantor are matters which hopefully will be clarified and explained at the trial.

F [30] The reasonable expectations of businessmen ought to be given due consideration where not all the terms of a contract is expressed in writing. A court is entitled to look at the correspondence between the parties and the conduct of the parties. As Lord Clarke of Stone-cum-Ebony observed in the Supreme Court (UK) in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 at p 773:

G The same principles apply where, as here, one is considering whether a contract was concluded in correspondence as well as by oral communications and conduct ...
... Instead the governing criterion is the reasonable expectations of honest sensible businessmen ...

H [31] Further His Lordship continued at p 778:

I ... We do not however think that it is necessary for that agreement to be express if by that is meant an express statement by the parties to that effect. Such unequivocal agreement can in principle be inferred from communications between the parties and conduct of one party known to the other.

[32] May it not be inferred here that the third defendant had not wanted to continue to be a guarantor once his entire shares in the first defendant had been

disposed of. He had a reasonable expectation as a sensible businessman and indeed he said it was made known to him by the second third party's representative and agent Encik Mohamed Ali Ghazali that the second third party would replace him as a guarantor.

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[33] The court cannot ignore the context in which the agreement to dispose of all the third defendant's interest to the first third party is conceived and carried out. The consideration was that the whole of the third defendant's debt to the first defendant was to be set-off from the purchase price consideration. Thereafter the first third party would assume the liability for the said debt and being in control of the first defendant, the first third party may then decide how best to deal with the said liability and when to discharge the said liability. As a business deal it is not uncommon. The first defendant continued to enjoy the loan given by the plaintiff. In such a context can it be said that the third defendant would continue to be exposed to the liability of the loan vis-a-vis the first and second third party? The answer is probably not and a clearer answer one way or the other should be had at the trial.

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[34] In this context it might be opportune to remind ourselves of the observation of His Lordship Gopal Sri Ram JCA (as he then) in the Federal Court case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at p 620:

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Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. *It is entitled to look at the factual matrix forming the background to the transaction.* Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract ... (Emphasis added.)

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[35] Here by the third parties proceeding the third defendant is seeking a contribution and/or indemnity from the third parties. There are many and a myriad of circumstances under which a right of indemnity may arise. As stated by Lord Atkinson in *Eastern Shipping Co Ltd v Quah Beng Kee* [1924] AC 177 at pp 182–183:

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A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do ...

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- A The right of indemnity need not arise by contract; ... it may arise (to use Lord Eldon's words in *Warring v Ward* 7 Ves 332, at p 336; a case of vendor and purchaser) in cases in which the court will 'independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation' of the vendor. These considerations were all dealt with by the Lords Justices in *Birmingham and District Land Co v London and North Western Ry Co* [1901] AC 118.
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- [36] I would say that under the current circumstance in which the contract was concluded, the third defendant does have a plausible claim and a reasonable cause of action against the first and second third party. At any rate at this stage it is not necessary to descend into a contest or trial on affidavits. As was observed by His Lordship KN Segara JCA in the Court of Appeal case of *BBC Estate V Sdn Bhd & Ors v TR Madel anak Kandou & Ors* [2008] 6 MLJ 285 at p 294:
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- An application to strike out an action under O 18 r 19 of the RHC should not descend into a trial on affidavits. What the court should be concerned with is to determine whether the pleadings disclosed facts which merit a trial of the action.
- E The plaintiffs' statement of claim herein certainly disclosed facts which merit a trial of the action.

[37] I would adopt a similar approach.

- F [38] It was further contended by the second third party that the said Encik Mohamed Ali Ghazali had exceeded his authority in agreeing to replace the third defendant with the second third party as a guarantor. Whether he has exceeded his authority as an agent for the third parties is certainly a matter that should go for trial in the light of conflicting affidavits filed by the third defendant and the third parties.
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- [39] One may echo the words of His Lordship Gopal Sri Ram JCA (as he was then) in *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417 at pp 426–427 in the context of a striking out of a statement of claim under O 18 r 19 of the RHC:
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- ... Looking at the above pleadings, and the lengthy affidavits and the various affidavits filed by Carah and the lenders, there is a serious conflict of material affidavit evidence which can only be resolved by subjecting the deponents to cross-examination and/or calling other witnesses whose evidence can only be evaluated by the court after seeing and hearing them. The court cannot conduct a trial on the silent cold-printed or typewritten words in the opposing affidavits where there is a serious dispute or conflict of material facts, a finding of which by a trial judge will have a decisive consequence on the case of the parties. We are mindful of
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what Lord Diplock said in the House of Lords in *American Cyanamid v Ethicon Ltd* [1975] AC 396 at p 407:

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

PRONOUNCEMENT

[40] In the light of the reasons set out above, I had dismissed the appeal of the third parties with costs in the cause.

Third parties' appeal dismissed with costs.

Reported by Ashok Kumar

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